Supreme Court, U.S.
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No. _

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SOLVENTES Y QUIMICA DE NICARAGUA, S.A. SOLQUIMISA; TRANSMERQUIM DE MEXICO S.A. DE C.V.; TRANSMERICIAN GUATEMALA, S.A.; TRANSMERIDIAN EL SALVADOR S.A. DE C.V.; TRANSMERQUIM DE COSTA RICA S.A.; QUIMICA FLAMINGO, S.A.; AND, TRANSQUIMICA S.A. DE C.V.
Petitioner,

v.

John W. Weaver, Liquidating Trustee,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED

Whether 11 U.S.C. 7004(d) creates a different jurisdictional test such that an alien entity's forum conduct solely associated with a "purchase" constitutes purposeful availment of the forum's benefits sufficient to substantiate the imposition of *in personam* jurisdiction and not violate the traditional notions of fair play and justice.

RULE 29.1 LISTING

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SOLVENTES Y QUIMICA DE NICARAGUA, S.A. SOLQUIMISA; TRANSMERQUIM DE MEXICO S.A. DE C.V.; TRANSMERICIAN GUATEMALA, S.A.; TRANSMERIDIAN EL SALVADOR S.A. DE C.V.; TRANSMERQUIM DE COSTA RICA S.A.; QUIMICA FLAMINGO, S.A.; AND, TRANSQUIMICA S.A. DE C.V.,

Petitioner,

v.

JOHN W. WEAVER, LIQUIDATING TRUSTEE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Solventes Y Quimica de Nicaragua, S.A. Solquimisa; Transmerquim de Mexico S.A. de C.V.; Transmerician Guatemala, S.A.; Transmeridian El Salvador S.A. de C.V.; Transmerquim de Costa Rica S.A.; Quimica Flamingo, S.A.; and, Transquimica S.A. de C.V. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals For the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unreported. The judgement and supporting memorandum of the United States District Court For The Southern District Of Texas, Houston Division (App. B and C, respectively) and the United States Bankruptcy Court For The Southern District Of Texas, Houston Division are unreported.

JURISDICTION

The court of appeals entered its judgment on November 20, 1995 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Operative Facts.

Each Defendant is an alien corporation organized under the laws of the country set forth in its name, except for Transquimica, S.A. De C.V. which is a Honduran corporation; and, Quimica Flamingo, S.A. which is a Columbian corporation. Trans Marketing Houston, Inc., the debtor in the underlying bankruptcy action, (hereinafter referred to as "TMHI") was formed in 1983. TMHI manufactured no product, rather, purchased and sold petrochemical derivative compounds and commercial grade chemicals on the open market. Commercial grade chemicals were the products TMHI sold to eight Central and South American corporate entities. Seven of these entities are the named Defendants. At least five of the Defendants have been in existence since 1984. No Defendant owns any interest in TMHI [Tr. 655]. TMHI owns no interest in any Defendant [Tr. 158]. No Defendant owns any other Defendant [Tr. 158]. Each Defendant has foreign ownership

either by a Netherlands Antilles holding corporation, TMH (Trans Marketing Houston) N.V., or respective individual investors [Tr. 622]. Each Defendant principally operates in the country of its incorporation [Tr. 158]. No Defendant has any manufacturing operations in the United States [Tr. 157]. No Defendant sells anything in the United States [Tr. 157]. No Defendant is authorized to do business in the United States [Tr. 157]. No Defendant maintains an office or has any administrative operation in the United States [Tr. 157]. No Defendant has any real property in the United States or in any country outside the country of its incorporation [Tr. 157]. No Defendant owns any personal property in the United States with the exception of the El Salvador and Guatemala Defendants who did have domestic bank accounts which were solely used to effect payment for their respective purchases [Tr. 157].

TMHI does not manufacture any good or product, rather, acts as a conduit, a broker, a seller, to third parties, of other person's products.

Defendants' and TMHI's business was conducted via telephonic or telex means. All of the documentation originated and was generated by TMHI [Tr. 465]. No written contracts exist formally memorializing any TMHI/Defendant marketing or other long-term relationship. No Defendant sent any employee or other representative to TMHI in Texas to make purchases, negotiate contracts, or take any other action [Tr. 157]. A Defendant would make an enquiry as to a product, TMHI would ascertain whether it could meet that enquiry; arrange for delivery of the product to a TMHI designated port, usually Texas; TMHI would arrange for a motor vessel to transport the product from the TMHI designated port of shipment to its destination; TMHI would provide a credit facility; TMHI would then reduce this information to a formatted conditional

telex confirmation (hereinafter referred to as the "purchase telex") transmit the purchase telex to the respective Defendant for its approval or rejection. The purchase telex provides that Defendant has to communicate rejection or the telex shall be construed as an operative contract [Tr. 369]. Failure to reject is deemed as acceptance. The last necessary act to consummate the purchase contract rested in the Defendant [Tr. 369]; therefore, the contract were formed without the United States.

TMHI purchased chemicals on credit from whatever source and arranged for delivery, usually in Texas or Louisiana, then ultimately sold these chemicals to third parties. Once acquired TMHI would transmit the purchase telex to the respective Defendant who then had two to three days to accept or reject the offer [Tr. 464, 369]. The purchase offer was on extended 180 day open payment terms [Tr. 369]. TMHI's financing and credit facility was provided by Banque Paribas [Tr. 647]. TMHI's Banque Paribas credit facility allowed TMHI to provide the Defendants their credit arrangement [Tr. 647].

For whatever reason after December 1992 Banque Paribas canceled TMHI's credit facility. Banque Paribas's unilateral action triggered TMHI's immediate demise [Tr. 647]. The ripple effect meant that TMHI could not continue to grant extended terms to the Defendants and continue to service supplier related debt. [Tr. 623] TMHI's Defendant related credit facility was controlled by TMHI and Banque Paribas [Tr. 647]. On April 16, 1993, TMHI filed for protection under Title 11, Chapter 11 of the United States Bankruptcy Code. John Weaver qualified and was subsequently appointed Liquidating Trustee (hereinafter referred to as the "Trustee").

The Trustee's adversary complaint was brought to collect amounts allegedly owed to TMHI by each Defendant on open account. The claim against each Defendant is separate and distinct cause of action and does not involve any other Defendant. This is a non-core proceeding originating in a state law claim.

B. Proceedings Below

This is a collection action by Mr. John Weaver, Liquidating Trustee, for accounts receivable which originated as a non-core adversary complaint in Case No. 93-43008-H4-11, styled In re: Trans Marketing Houston, Inc.; In The United States Bankruptcy Court For the Southern District Of Texas, Houston Division, the Honorable William Greendyke presiding (hereinafter referred to as the "TMHI bankruptcy". The adversary complaint is Case No. 94-4292, styled John W. Weaver, Liquidating Trustee, Plaintiff vs. Solventes Y Quimica De Nicaragua, S.A. Solquimisa; Transmerquim De Mexico, S.A. De C.V.; Transquimica, S.A. De C.V.; Transmeridian El Salvador, S.A. De C.V.; Transmerquim De Costa Rica, S.A.; and Quimica Flamingo, S.A.; In The United States Bankruptcy Court For The Southern District Of Texas, Houston Division (hereinafter referred to as the "Adversary Complaint").

The Trustee filed the Adversary Complaint on April 11, 1994 seeking to collect an account or accounts receivable from each of the named Defendants.

Defendants' filed answers subject to a Plea to Lack of Personal Jurisdiction complaining not only on lack of personal jurisdiction, but, improper service of process and venue. The bankruptcy court set the Defendants' Plea to the Lack of Personal Jurisdiction for an evidentiary hearing on October 3, 1994. No live testimony was elicited. The

jurisdictional argument was submitted to the court on affidavit or written testimony subject to perjury. The court considered the evidence and counsel's argument. The court ruled that Bankruptcy Rule 7004(d) provided for nationwide service of process and, as such, applying a federal aggregate contacts test, held the Defendants had sufficient United States contacts to substantiate the imposition of *in personam* jurisdiction. The court so noted its ruling by docket entry.

Pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8003 on October 13, 1994, the Defendants filed a Notice of Appeal, in addition to, Motions for Leave to Appeal. On December 6, 1994, the clerk entered the District Court's Order granting the motion for leave to appeal. On December 15, 1994, the Defendants filed their Designation of Contents For Inclusion In The Record, and Statement of Issues On Appeal.

On January 3, 1995, Defendants timely filed their Brief In Support Of An Appeal From The Plea To Dismiss for Lack Of Subject Matter Jurisdiction. The Trustee filed his brief on January 27, 1995.

The District Court, the Honorable Kenneth M. Hoyt, rendered his Final Judgment on May 1, 1995 together with a Memorandum On Appeal Of Interlocutory Order. On May 30, 1995 the Defendant's timely filed their Notice of Appeal.

On July 25, 1995, Defendants filed in the United States Court of Appeals For The Fifth Circuit their Appellants' Brief. On or about August 24, 1995 Plaintiff filed its Appellee's Brief. On September 5, 1995 Defendants filed their Appellants' Reply Brief.

On November 19, 1995 the Fifth Circuit rendered its judgment affirming the jurisdictional aspects of the district

court's opinion, vacating and remanding the district court's decision as the service of process issues.

REASONS FOR GRANTING THE PETITION

Substantial transnational commercial activity between alien corporations and United States producers is affected until this Court dispositively rules on this issue. Rosenberg Bros. & Co.v. Curtis Brown Co., the seminal case concerning the jurisdictional exclusion for purchases, continues to provide a framework for jurisdictional analysis associated with purchase related activities. At the district court level, conflicting decisions are proliferating in virtually all circuits, and the need for guidance from this Court is acute. This case is timely and a rare opportunity to provide this guidance. Moreover, the district court decision applies the wrong analysis, is erroneous, and the issue that it addresses is important.

I. The Operation of 11 U.S.C. Section 7004 In Conjunction With The Proliferation of Bankruptcy Filings Creates Disparate Application Of Current Jurisdictional Analysis.

11 U.S.C Section 7004, Bankruptcy Rule 7004(d), statutorily provides for a nationwide service of process in matters falling within the purview of Title 11. The nationwide service of process provisions expands the threshold minimum contacts test to include no only forum contacts, but, United States domestic contacts as a whole. This federal aggregate minimum contacts test establishes a different standard for alien entities which conduct strictly purchase side transactions. The proliferation of bankruptcy filings has, and the subsequent exercise of this statutory power by Title 11 trustees, created disparate treatment between non bankruptcy related cases. An alien national

which studiously negotiates through the jurisdictional maze to avoid forum conduct is now captured by, at a minimum, the place of payment argument. Virtually all domestic companies generally require domestic payment. Application of the aggregate federal contacts test secures United States jurisdiction, whereas, in a non bankruptcy context such jurisdictional imposition can be avoided. Pivotal to any jurisdictional analysis is the subjective standard attained through objective analysis, either purposeful or imputed, that the defendant intended to avail itself of the forum's protection and benefits.

Defendants agree that the United States conduct does not support a nexus to establish general jurisdiction. Defendants had no continuous and systematic contacts with Texas. The specific jurisdiction minimum contacts test is satisfied when a nonresident "**purposely avails**" itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." Burger King Corp. v Rudzewicz, 471 U.S. 462 (1985), citing Hanson v. Denckla, 357 U.S. 255, 253 (1958).

"Purposeful availment." Totality of the circumstances comprises the applicable standard. Judge Brandeis's opinion for a unanimous court in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923) makes clear that purchases and related trips, standing alone, are not a sufficient basis for a state's assertion of jurisdiction. This opinion is the benchmark. Implicit in the Brandeis opinion, and fueling seventy years of circuit court text, lies "purposeful availment," whether based upon the totality of the circumstances a nonresident purposefully avails itself of the forum's protection and benefits.

BEST AVAILA

This case involves the **purchase** of commercial chemicals, not the domestic sale or distribution of Defendants' product.

Jurisdictional case law involves the introduction, distribution, placement, or sale of a good or product, or, the rendering of a service into the forum either through direct or indirect conduct. Case law from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) forward, whether through this Court, the courts of appeals, or the district court, have all wrestled with factual determinations concerning to what extent, if any, the defendant acknowledged the forum's right to acquire jurisdiction. Rosenberg Bros. excepted the "purchase" scenario.

This case involves an alien national's conduct attributable solely to the consummation of a purchase. No defendant sold, manufactured, or fabricated any good, or rendered any service within the forum, even if, the federal aggregate minimum contacts test is applicable.

No Defendant owns any interest in the TMHI nor does TMHI own any interest in any of the Defendants. The individual Defendants are foreign owned by TMH N.V. and the remaining stock positions are predominantly held by foreign interests or local investors within the respective country of origin. Neither the Defendants nor their respective ownership interests have sought bankruptcy protection pursuant to Title 11. TMH N.V., TMHI and the Defendants do share similar individual shareholders some of whom are either officers or directors of the various entities. Further, Defendants concede that the purchase relationship spanned nearly nine years.

Fifth Circuit law exists on the entire range of the jurisdictional scale. Each case involves similar facts which,

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in of themselves, are not determinative of jurisdiction, but, are one factor to be considered in the totality of circumstances test. "[I]n the determination of whether a foreign corporation should be required to defend itself in a suit in Texas arising out of a contract between it and a Texas corporation, each case must be decided on its own facts." Southwest Offset, Inc. v. Hudco Publishing Co., Inc., 622 F.2d 149, 151 (5th Cir. 1980). "What is more significant is whether the contacts suggest that the nonresident defendant purposefully availed himself of the benefits of the forum state." Brown v. Flowers Industries, Inc., 688 F.2d 328, 333 [(5th Cir. 1982) (citing Quasha v. Shale Dev. Corp., 667 F.2d 483, 488 (5th Cir. 1982)]. "Considerations such as the quality, nature, and extent of the activity in the forum, the foreseeability of the consequences within the forum from activities outside it, and the relationship between the cause of action and the contacts, relate to whether it can be said that the defendant's actions constitute 'purposeful availment." Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1268 (5th Cir. 1981).

Under the federal constitutional test of due process, there must be a showing that (1) the defendant has established minimum contacts with the forum state, and (2) the assertion of jurisdiction will not offend traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The Texas Supreme Court has established a three-part jurisdictional test. Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223 (Tex.1991). First, the nonresident must have purposefully established "minimum contacts" with Texas. There must be a "substantial connection" between the nonresident and Texas arising from conduct of the nonresident purposefully directed toward Texas. Second,

when specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident's contacts with Texas. Third, the assertion of jurisdiction must comport with fair play and substantial justice.

The defendant must do something purposeful to avail himself of the privilege of conducting activities within the forum, thus invoking then benefit and protection of the forum's laws. Hanson v. Denckla, 357 U.S.235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) Those activities must justify a conclusion that the defendant should reasonably anticipate being called into court there. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980) Thus, it is the Defendant's action and conduct, not the Plaintiff which is relevant to a minimum contacts analysis. Kulko v. California Superior Court, 436 U.S. 84, 93, 98 S.Ct. 1690, 1697, 56 L.Ed.2d 132 (1978)

Even if minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice" International Shoe Co., infra, The fundamental fairness test requires examination of (1) the defendant's burden; (2) the forum state's interests; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the state's shared interest in furthering fundamental social policies. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987).

The unique burdens placed upon a foreign national, particularly an alien, defending itself locally "should have significant weight" in assessing the "reasonableness" of a local court's exercise of personal jurisdiction. Asahi at 114.

The Defendants substantial burdens are obvious. Defendants' native language is Spanish and United States litigation is a long distance effort at best.

The defendants' domestic contacts, if any, predominantly occurred in the State of Texas. If a district court applied strictly a forum contacts test purposeful activities conducted solely by the defendants' would arguably not support a jurisdictional finding. Defendants' conduct was limited strictly to purchases because no evidence was or can be elicited that defendants' conduct was anything to the contrary.

Defendants concede a long standing "purchaser" relationship with TMHI. These purchases were pursuant to contract formed within the Defendant's given jurisdictions and on TMHI's terms. TMHI dictated the purchase terms. TMHI does not dispute that no Defendant sold any product within the domestic United States market. The Trustee does claim that, notwithstanding the passive purchaser status, the Defendants conducted business within the forum pursuant to statute.

Section 17.042(1), Texas Civ. Prac. & Rem. Code, states,

> "[A] nonresident does business in this state if the nonresident (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or part in this state..."

The Texas long arm statute provisions alluded to by the district court would appear to equally apply to purchasers and sellers, but in weighing the factors relevant to due process; however, some state courts, including Texas, have drawn a distinction that a sales contract may be sufficient for long

arm jurisdiction over a nonresident seller, but not the buyer. U-Anchor Advertising v. Burt, 553 S.W. 2d 760 (Tex. 1977), cert. denied 434 U.S. 1063 (1978); Trinity Steel Company v. Modern Gas Sales & Service Co., 392 S.W.2d 861 (Tex.Civ. App. - Texarkana 1965, writ ref'd n.r.e.). The courts that draw this distinction are very troubled by what is referred to as the "mail order analogy," the fear that long-arm jurisdiction might be used by some national retailers to prosecute passive purchasers of goods.

Hypothetically, if a Texas resident has a nine year purchase history with Sears, whose warehouse is in Wisconsin, a fact known to the purchaser, goods are shipped from Wisconsin, and payment is requested to its Arizona service center. Does this mean that the Texas resident has submitted herself to a Wisconsin or Arizona court? Doubtful, mail order houses would be out of business. However, few would argue the contrapositive does not hold; *id est* that the Texas resident could hold the Wisconsin company to jurisdiction in Texas. Why the distinction? The distinction is because we are in a purchase only situation. A passive rather than active mode. The goods are purchased pursuant to the seller's terms and conditions with the buyer having minimal, if any, discretion in the transaction.

Defendants would concede that if an alien purchaser came into the forum to specifically assist, direct, or manage the construction or manufacture of the purchased goods such conduct could support a purposeful availment finding; however, no such facts are present instanter. Defendants contend that as passive purchasers they should not be hailed into this country to litigate claims over goods purchased ostensibly by means subject to statutory enactment. Because 11 U.S.C. 7004(d) provides for the federal aggregates minimum contacts test payment issues or non-jurisdictional boilerplate contractual provisions capture them.

Defendants' case is only passive purchase. Defendants cite the only case without the Fifth Circuit to support their position. Judge Celebrezze's opinion for the United States Court of Appeals For the Sixth Circuit in In-Flight Devices Corp. V. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972) is illustrative.

> In our economy the seller often initiates the deal, tends to set many, if not all off the terms on which it will sell, and, of course, bears the burden of producing goods or services, in the course of which production injuries and other incidents giving rise to litigation frequently arise. The buyer, on the other hand is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertising and agreeing only to pay a sum upon receipt of the goods or services. It is understandable that sellers more often seem to have acted in a manner rendering them subject to long-arm jurisdiction.
>
> The mere fact that a buyer is the defendant in a long-arm situation should not preclude an assertion of jurisdiction over such defendant, however...To the extent the buyer vigorously negotiates, perhaps dictates, contract terms, inspects production facilities and otherwise departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears. Id. at 233.

Defendant's conduct constitutes a "passive" role. The record does not contain evidence that the Defendants participated in the negotiations, quite the contrary, TMHI was the focus. Passive equates with no purposeful availment. No conduct beyond that which is inevitable in the nature of a purchase, offer, acceptance, and consideration. Either we remove the distinction as a whole and rewrite International Shoe v. Washington, or adopt Judge Celebrezze's economic characterization.

II. The Decision of the Court of Appeals is Erroneous

The District Court's Judgment (App. B) and supporting Memorandum Of Appeal Of Interlocutory Order (App. C) relies on and applies a Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., 9 F.3d 415 (5th Cir. 1993) analysis to the facts. The District Court's opinion is distinguished hereinbelow. Whatever current test case the circuit adopts, whether it be Ruston; or, Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983) which exhibits some factual similarity. A nonresident defendant's principal activity was without Texas pursuant to a contract which provided for Hydrokinetics's product manufacture. The contract called for payment in Texas. Alaska Mechanical's one time excursion into the forum to consummate a single sale is the principal distinguishing factor. The Court focused on the fact that Hydrokinetic's unilateral activity and conduct could not satisfy the requirement of contact between Alaska Mechanical and Texas. Seller's indicated place of payment was also insufficient to confer jurisdiction citing the U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977) cert. denied 434 U.S. 1063, 98 S.Ct 1235, 55 L.Ed.2d 763 (1978); or, Command-Aire v. Ontario Mechanical Sales & Service, 963 F.2d 328 (5th Cir. 1982) wherein the Court

noted that place of performance is a weighty consideration in the jurisdictional issue; however, the weight is diminished when the decisions to perform contractual obligations within the forum state are totally unilateral; or, Stuart vs. Spademan, 772 F.2d 1185 (5th Cir. 1985) which recites the purposeful availment or totality of the circumstances test. Notwithstanding a litany of forum contacts the Court concluded that:

> "...the inference of purposeful availment necessary to support the exercise of personal jurisdiction over Spademan is not supported. The random use of interstate commerce to negotiate and close a particular contract, the isolated shipment of goods to the forum **at the instigation of the resident plaintiffs**, and the mailing of payment to the forum do not constitute the minimum contacts necessary to constitutionally exercise jurisdiction over Spademan." Spademan at 1194. (Emphasis added)

Notwithstanding Spademan's contacts the Court found that the quality of such contact did not support the inference that Spademan had purposefully availed itself of the forum's benefits and protection; or, Ruston Gas Turbines, Inc. v. Donaldson Co., Inc., infra, the case upon which the District Court's opinion appears to have been modeled. Ruston again involves a product placed within the domestic stream of commerce. Ruston's transaction was two way. The party seeking to avoid jurisdiction manufactured an item and purposefully placed the item in another forum. The court never had to address the foreseeability issue because the third party manufacturer had actual knowledge. The product sold was utilized in another forum. Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th Cir. 1974) argued in the

Appellee's District Court brief is distinguished as another stream of commerce case. The placement of a good or service into the stream of commerce denotes purposeful availment.

The account receivables were generated pursuant to purchase contracts. Black's Law Dictionary defines "purchase" as the transmission of property from one person to another by voluntary act and agreement, founded upon valuable consideration. Citing Spur Independent School Dist. v. W.A. Holt Co., 88 S.W.2d 1071, 1073 (Tex.Civ.App. - Waco 1935, no writ). A purchase anticipates offer, acceptance, and consideration. A purchase intuitively anticipates the delivery of property.

A "typical" transaction based upon his interpretation of TMHI documents evidences that following the initial contact, a proposed agreement between TMHI and the purchaser would be generated and transmitted by telex. Each telex contains the following proviso:

> "These specific terms and conditions together with TMHI's General Terms and Conditions and TMHI's Maritime Provisions, if applicable shall constitute the entirety of the agreement between Buyer [Defendant] and Seller [TMHI] unless response to the contrary is made to TMHI within three (3) business days from date of the hereof. Otherwise, TMHI will assume as agreement has been reached and may undertake obligations necessary for its performance under this Agreement."

The quoted language constitutes a conditional offer. Preload Technology, Inc. v A.B. & J. Const. Co., Inc., 696 F.2d

1080, rehearing denied 703 F.2d 557; A conditioned acceptance may constitute a counteroffer, but does not bind either party. Kurio v. U.S., 429 F.Supp. 42 (D.C. Tex. 1970). The provisional language means the contract was accepted when the three day limitation ran, or the last act, absence of rejection, occurred. Acceptance occurred in the Defendant's country, not the United States. Diaz v. Southeastern Drilling Co. of Argentina, S.A., 324 F.Supp. 1 (D.C. Tex. 1969) affirmed 449 F.2d 258; Durant Chevrolet Co. v. Industrial Towel & Uniform Co., 624 S.W.2d 628 (Tex.App. - Fort Worth, 1981, no writ). Therefore, every contract was formed **outside** the United States.

TMHI was not a manufacturer, rather, bought and sold hydrocarbon derivative and chemical products on the open market. TMHI was a trading facilitator of global products buying then reselling to clients. The absence of Defendants' participation in the decision process is critical to the jurisdictional analysis. TMHI made unilateral determinations as to the products' origin, destination, port of shipment, and carrier. This conduct, upon which jurisdiction was based, is not attributable to the Defendants.

The purchase telex recited the purchase of certain goods, at a certain location, to be shipped via a certain carrier. The purchase telex and the supporting documentation are TMHI generated documents. There is no evidence that any given Defendant negotiated any term within that contract or the supporting documentation. That TMHI chose Texas as the point of shipment begs any title passage question. TMHI made the decisions with respect to point of shipment and carrier then such is conduct attributable to TMHI rather than the Defendants' purposeful action.

Place of payment only appears on the TMHI invoices as boilerplate.

Choice-of-law provisions do not confer jurisdiction or select forum. The choice-of-law provision does not in and of itself confer jurisdiction, rather, is one indicia, to merit consideration in the factual sliding scale analysis. Stuart v. Spademan at 1195 citing Burger King, 105 S.Ct. 2187. The choice-of-law provision appears as boilerplate on the reverse side of TMHI's pre-printed invoice form. Burger King is distinguishable because the parties contractual relationship anticipated franchise associated exchange, *id est*, advertising, product, product promotion, management assistance in exchange for remuneration. No Defendant is a TMHI franchise. Burger King is distinguishable because no evidence exists that first, the forum contacts derived from any long term contract; second, that the parties anticipated a future relationship; and third, that one parties existence depends upon another's survival.

Defendants were not the only foreign entities with which TMHI conducted business. Throughout the extended relationship between TMHI and the Defendants no Defendant ever travelled to the forum to consummate business. No staff or office existed. The only United States property any of the Defendants owned were the El Salvador and Guatemalan bank accounts established to facilitate payment and exchange problems.

No Defendant maintained any staff, office, or place of operation or was authorized to conduct any business within the United States.

Common shareholders, officers, and directors and their relationship to the Defendants are presented by the District Court as evidence to support purposeful availment.

Implicit in the respective arguments is attribution, that the conduct of one can attributed to another. There is no evidence that a parent/subsidiary relationship exits, in fact, the evidence is to the contrary. Even a legal relationship rising to the parent/subsidiary level has been held insufficient to confer or to impute jurisdiction to the other. Dalton v. R&W Marine, Inc., 897 F.2d 1359 (5th Cir. 1990); See also, Aaron Ferer & Sons Co. v. Diversified Metals Corporation, 564 F.2d 1211 (8th Cir. 1977). The mere existence of common shareholders or officers and directors can not, in and of itself, provide a jurisdictional basis absent some purposeful conduct, an alter ego allegation, and competent proof. Dalton, infra. To attribute shareholders conduct to corporation it must be shown that "separate entity" character has been abused, or that the corporate fiction is utilized to achieve an inequitable result or conceal fraud or illegality. Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1162 (5th Cir. 1983).

The district court erred in applying the applicable test to the facts. The district court stated as factual basis for its decision factors which should not be considered for a jurisdictional analysis. Specifically, the district stated,

> "The evidence demonstrates that the activities of the parties in the case evolved primarily in Texas" (App.C, p. 11a)

No defendant ever participated in any activity within this forum, namely Texas. Texas is TMHI's state of incorporation not any Defendant. TMHI is not a defendant, nor does it own any defendant or vice versa.

> "[t]he contracts were generally performed in Texas and the chemicals were delivered and stored in Texas" (App. C, p. 11a)

TMHI did not manufacture these chemicals, but purchased such goods on the open market then arranged for their delivery. Again this is not a defendant activity.

> "[a]ppellants entities are directly or indirectly owned by Texas residents" (App. C, p. 12a)

Ownership is not purposeful conduct.

> "[e]ach appellant has at least one officer and director residing in Houston" (App. C, p. 12a)

In the absence of officer or director specific related conduct attributable to any defendant's activities the fact is irrelevant.

> "The petition in bankruptcy of one of the parties is pending in the Southern District of Texas" (App. c, p. 12a)

The mere fact the unrelated debtor is located within this district does not support a jurisdictional finding. The debtor's geographic residence bears no relationship to whether the defendant had forum contacts.

The remaining criteria hinge upon TMHI's extensive control of the relationship. TMHI is a Texas corporation who maintained its principal place of business in Houston, Texas. Logic dictates TMHI's records are within the forum, and that Texas has some interest in the resolution of the matter; however, the issue in this Adversary Complaint is the alien corporations' forum conduct, not the debtor's. Defendants did not purposefully avail themselves of this forum's protection or benefits. The District Court's statement that one of the parties is in bankruptcy is totally

inaccurate if the statement refers to any Defendant because no Defendant has sought protection pursuant to Title 11.

The District Court's approach to meter the balance is erroneous. First, whether "It is clear that by virtue of the appellants' [Defendants] conduct and activities, they have enjoyed the benefits, protection, and privileges of a Texas forum" (App. C) is the focus of this appeal.

TMHI's unilateral acts should not be the basis for a minimum contacts. The above noted cases each involve an "active" participant, an entity or individual which created something and sought to negotiate its exchange. The district court failed to adopt a passive-active distinction; consequently, the court erroneously applied the most often utilized active conduct analysis. As alien corporate purchasers, the Court, in applying the federal aggregate minimum contacts test, should have characterized defendants conduct as "passive purchasers." In law, the end should never justify the means.

III. The Question Presented Is Important.

Production of commercial grade industrial chemicals generates substantial economic revenue and benefit for domestic producers. Domestic producers market their goods worldwide. The Gulf Coast, because of its anomalous geographic proximity to petroleum raw materials, acts as the principal conduit for alien sales. The majority of this activity occurs through Texas and Louisiana. Texas, right or wrongfully, suffers the ignominity of the "litigation magnet" distinction, in addition to, having taken the "substantial jury awards" category. Alien consumers, such as these defendants, are guardedly cognizant about defending on United States soil. Their zeal, in seeking to avoid *in personam* jurisdictional findings, is paramount. Sufficient

alternatives exist to insure a party's compliance and performance in a transnational commercial transaction. These alternatives are a cost factor incorporated into any commercial activity. Patterned behavior based on existing legal standards is rendered moot by pervasive jurisdictional grants and applications. Nationwide service of process, as currently applied, vitiates reasoned business judgement and conduct. The deal changes.

The recent bankruptcy filing proliferation has spawned a new generation of Title 11 trustee litigation. 11 U.S.C. § 547 preference litigation occupies the forefront with expanded litigation utilizing 11 U.S.C. § 7004 competing for the number one slot. Alien corporations are haled into foreign state court on matters previously unknown in the commercial context. The market adjusts, cognoscenti can adequately counsel avoidance because legal clarity exists. Efficient, expeditious resolution of the debtor's estate is underscored; however, Justice Scalia's observation the "[n]othing is more wasteful than litigation about where to litigate." Bowen v. Massachusetts, 487 U.S. at 930 (dissenting opinion) is noteworthy. These alien companies never anticipated being haled into this forum. these companies specifically avoided the United States market for their products. This Court has not directly opined on "passive purchase" side jurisdictional issues.

We live in an ever shrinking economic sphere where each market participant struggles to maintain its proportionate share. In order to maintain advantage and advance economic prerogative consistency in law should prevail. Not that every single question need be answered, rather, formative guidelines from which appropriate economic behavior can be structured are requisite. Historically, much has changed since 1923; moreover, much has changed since the enactment of 11 U.S.C. § 7004(d).

The traditional notions of fair play and substantial justice demand a reexamination of jurisdictional analysis and application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-20425
Summary Calendar

In the Matter of:
TRANS MARKETING, Houston, Inc.,
Debtor.

SOLVENTES, Y QUIMICA DE NICARAGUA S A SOLQUIMISA; TRANSMERQUIM, DE MEXICO S A DE C V; TRANSMERICIAN, GUATEMALA S A; TRANSMERIDIAN, EL SALVADOR S A DE CV; TRANSMERQUIM DE COSTA RICA S A; QUIMICA FLAMINGO, S A; TRANSQUIMICA SA DE, CV,
Appellants,

VERSUS

JOHN W. WEAVER, Trustee, Liquidating,
Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(H-94-CV-3601)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:*

John W. Weaver, Liquidating Trustee ("Trustee"), for Trans Marketing, Houston, Inc. ("Debtor"), in Bankruptcy Case No. 93-43008-H4-11, in the Bankruptcy Court for the Southern District of Texas, filed a non-core adversary complaint in Case No. 94-4292, against seven Central and South American corporate entities (the "defendants"), seeking to collect on accounts receivable owed by each defendant to the Debtor. The defendants, appearing subject to a plea of lack of personal jurisdiction, filed objections to the jurisdiction of the court, claims of improper service of process and improper venue, and general answers. The bankruptcy judge set the pleas to the jurisdiction for a hearing and ruled that the defendants had sufficient United States contacts to substantiate imposition of in personam jurisdiction and that Bankruptcy Rule 7004(d) provided for nationwide service of process. The defendants appealed the rulings of the bankruptcy judge to the United States District Court. The district court affirmed the bankruptcy judge's holdings which denied motions to dismiss for lack of personal jurisdiction and for forum non conveniens. The district court, however, reversed the holding of the bankruptcy judge that citation was properly effected. The defendants appealed to this Court.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

We have carefully reviewed the briefs, the record excerpts and relevant portions of the record itself. For the reasons stated by the district court in its Memorandum on Appeal of Interlocutory Order entered under date of May 1, 1995, we AFFIRM the holding of the district court which affirmed the holding of the bankruptcy judge which denied motions to dismiss for lack of jurisdiction and for forum non conveniens.

Our appellate review of the propriety of the bankruptcy judge's determination regarding the sufficiency of service of process is complicated by the fact that neither party chose to include in the appellate record the text of the bankruptcy judge's memorandum on this issue nor the transcription of the bankruptcy judge's ruling, if it was an oral ruling. Likewise, the appellate record does not contain copies of any returns of service nor of any affidavits of any person as to the manner and means by which service of process was effected. Consequently, we are unable to resolve the apparent conflict between the ruling of the bankruptcy judge that service of process was sufficient and the ruling of the district court to the contrary. Under these circumstances, we think the ends of justice are best served by our VACATING the order of the district court insofar as it relates to sufficiency of service of process and REMANDING this matter to the district court with instructions to promptly remand the matter to the bankruptcy judge with instructions that the bankruptcy judge conduct a hearing if necessary and make appropriate findings of fact as to whether or not the methods of service of process used by the Trustee were reasonably calculated to give notice to the defendants of the claims asserted in the adversary proceeding as required by Bankruptcy Rule 7004 and Fed. R. Civ. P. 4.

AFFIRMED in part; VACATED and REMANDED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SOLVENTES Y QUIMICA	§	
DE NICARAGUA, S.A. ET AT..	§	
Appellants.	§	
VS.	§	CIVIL ACTION
	§	NO. H-94-3601
JOHN W. WEAVER,	§	
LIQUIDATING TRUSTEE,	§	
Appellee,	§	

FINAL JUDGMENT

The bankruptcy court's holding denying motions to dismiss for lack of personal jurisdiction and *forum non conveniens* is AFFIRMED. It's holding that service of citation was properly effected is REVERSED.

This is a FINAL JUDGMENT.

Signed this 1st day of May, 1995.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SOLVENTES Y QUIMICA	§	
DE NICARAGUA, S.A.,	§	
ET AL.,	§	
Appellants.	§	
	§	CIVIL ACTION
VS.	§	ACTION NO.
	§	H-94-3601
JOHN W. WEAVER,	§	
LIQUIDATING TRUSTEE,	§	
Appellee,	§	

MEMORANDUM ON APPEAL OF
INTERLOCUTORY ORDER

This is an appeal from an interlocutory order of a bankruptcy court finding that the bankruptcy court had personal jurisdiction over the defendants/appellants. Before the Court are the appellants', Solventes y Quimica de Nicaragua, S.A. Solquimisa; Tranmerquim de Mexico, S.A. de C.V.; Transquimica, S.A. de C.V.; Transmeridian Guatemala, S.A.; Transmeridian El Salvador, S.A. de C.V.; Transmerquim de Costa Rica, S.A.; and Quimica Flamingo, S.A., seeking review and reversal of an order failing to dismiss the defendants for lack of jurisdiction (instrument #13).

The Court, having considered the brief, the responses, the pleadings, the record evidence and the applicable law, is of the opinion that the appellants' motion to dismiss should have been granted in part without prejudice.

CONTENTIONS OF THE PARTIES

The appellants raise three points of error. First, they contend that this action should be dismissed for lack of personal jurisdiction. More, specifically, they contend that there are not sufficient contacts between the defendants and this forum to establish *in personam* jurisdiction because: (a) they are "mere purchasers" of chemicals from the appellee; (b) entering into a contract, by itself, does not establish the necessary minimum contacts contemplated by statute; and (c) TransMarketing Houston, Inc. ("TMHI"), acting as a broker on behalf of the defendants for delivery of goods, does not establish minimum contacts, despite substantial prior dealings.

The Trustee, on the other hand, contends that personal jurisdiction does exist. The necessary minimum contacts, are established because: (a) the appellants engaged in business in Texas by contracting with a Texas citizen TMHI. for the purchase and delivery of chemicals; (b) the contracts required the delivery of products in Texas; (c) the contracts provide that the law of the State of Texas shall govern; (d) all of the appellants are directly or indirectly majority owned by Texas residents; (e) each of the appellants has at least one officer and director who resides in Texas; (f) two of the defendants maintain bank accounts in the United States and one of those is in Houston; and (g), the appellants have continued to do business in the United States since TMHI's bankruptcy through another exclusive agent acting in Houston, Texas.

The appellants also challenge service of process. They advance a two-fold basis supporting the argument that service is improper: (1) the Trustee failed to comply with the Inter-American Convention on Letters Rogatory; and (2) the Trustee failed to comply with Rule 4(f) of the Federal Rules of Civil Procedure because service was not reasonably calculated to give notice.

Regarding these arguments, the Trustee contends that letters rogatory are not required to perfect service. However, if they are utilized, the Trustee concedes that one must follow the procedures of the Inter-American Convention. Additionally, the Trustee maintains that service cannot be successfully challenged because each of the defendants has hired American counsel and has appeared in court subject to their objections to jurisdiction.

Lastly, the appellants contend that the bankruptcy court erred in denying their plea of *forum non conveniens*. More specifically, they contend that this lawsuit comprises seven separate suits and, therefore, each suit should proceed against the defendant in the country of its incorporation.

The Trustee, on the other hand, contends that the appellants failed to meet their burden of showing that an alternative forum exists. Further, the Trustee contends that Texas is the more appropriate forum.

FACTUAL BACKGROUND[1]

The underlying suit was brought by the bankruptcy trustee to collect monies owed to TMHI. TMHI was in the

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[1] Additional facts are set forth below with more particularity relative to the Court's examination of the issues on appeal.

business of buying and selling chemicals. It sold chemicals to the appellants who, in turn, sold the chemicals in Central and South American countries including Mexico, Guatemala, El Salvador, and Honduras. Each of the appellants entered into a contract with TMHI in Houston for the purchase of chemicals and shipment of the chemicals.

AUTHORITIES AND DISCUSSION

The Court reviews the legal issues presently on appeal from the bankruptcy court *de novo* and examines the factual determinations of the bankruptcy court under a clearly erroneous standard. *United States v. United States Gypsum Co.*, 333 U.S. 364.395 (1948).

The party seeking to invoke jurisdiction of a federal court bears the burden of establishing a prima facie showing that the court may exercise *in personam* jurisdiction. Here, the Trustee has the burden of showing that this Court may exercise *in personam* jurisdiction over the appellants. In assessing whether the Trustee has satisfied this burden, the Court is to consider as true the uncontroverted allegations of the complaint. *D. J. Investments v. Metzler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542, 545 (5th Cir. 1985).

In this case, the Court may exercise personal jurisdiction over a foreign appellant if the Long-Arm Statute of the state in which it sits allows the exercise of jurisdiction, and the exercise of jurisdiction is constitutional. *Rittenhouse v. Mabrey*, 832 F.2d 1380-1382 (5th Cir. 1987).

The Texas Long-Arm Statute authorizes the exercise of jurisdiction over those who do business in Texas and it has been interpreted to extend to the limits allowed by the federal constitutional requirements of "due process." *See Guardian Royal Exchange Assurance, Ltd. v. English China*

Clays, P.L.C., 815 S.W.2d 223 (Tex. 1991). Further, the statute expressly provides that a nonresident defendant does business in this state if the nonresident "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state." Tex. Civ. Prac. Rem. Code Ann. § 17.04 (Vernon 1986).

The "due process" clause of the Fourteenth Amendment allows the exercise of personal jurisdiction over a non-resident defendant when two criteria are met: (1) the defendant has established "minimum contacts" with the forum state; (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

Personal jurisdiction has been devised into two types, general and specific, in which minimum contacts analysis is to made upon each. *Rutson Gas Turbines, Inc. v. Donaldson Co., Inc.*, 9 F.3d 415, 418 (5th Cir. 1993). When the basis of the suit is unrelated to the defendant's contacts with the forum state, general *in personam* jurisdiction will exist only if the defendant has sufficient "continuous and systematic contacts" with the forum state. *Id.* at 419. Thus, in order for the Court to constitutionally exercise *in personam* jurisdiction, the Trustee must show prima facie evidence that the appellants have established continuous and systematic contacts with Texas on an unrelated matter.

In the instant case, the evidence shows that the Trustee has failed to establish general jurisdiction. The appellants are organized under the laws of the country(s) set forth in its name. They have no investments in Texas, nor have they made any investments in Texas separate and apart from the contracts made the basis of this action. They have not entered into any other contracts that are to be performed

in Texas. Each of the appellants operate principally in the country of its incorporation. They are not authorized to do business in Texas and do not maintain an office in the United States.

The Trustee has sought to contradict these facts by asserting that the contracts between TMHI and the appellants supplies the necessary nexus. This nexus is insufficient to establish general *in personam* jurisdiction. Accordingly, the Court finds and concludes that no continuous and systematic contact with Texas has been established allowing this Court to exercise general *in personam* jurisdiction over the appellants.

The Court next turns to the issue of specific *in personam* jurisdiction. Specific *in personam* jurisdiction over a non-resident defendant is exercised when the lawsuit arises from or relates to the defendant's contact with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The specific jurisdiction minimum contacts test is satisfied when a non-resident appellant "purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), citing *Hanson v. Denkla*, 357 U.S. 255, 253 (1959). When a nonresident purposely avails itself within the forum state, that appellant "should reasonably anticipate being haled into court in the forum state." *Ruston Gas*, 9 F.3d at 419; (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The Trustee properly contends that the appellants purposefully availed themselves of the benefits and protections of the laws of Texas by entering into contracts with citizens of this state. Put another way, the Trustee

argues that Texas may assert specific jurisdiction over the appellants because the appellants engaged in substantial business by contracting and shipping chemicals in the United States. The Court agrees.

The Court is mindful that the act of contracting with a resident of the forum state, standing alone, is insufficient to subject a nonresident to the forum's jurisdiction. *Colwell Realty Investments, Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330, 1334 (5th Cir. 1986). In deciding whether the act of contracting with a Texas resident subjects a nonresident to jurisdiction in Texas, the Court must "look to the factors of prior negotiations, contemplated future consequences, terms of the contract, and the parties' actual course of dealing." *Id.* quoting *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir. 1985).

Applying the law to the facts of this case, the record evinces that TMHI entered into contracts with the appellants for the purchase and delivery of chemicals. The appellants' contention that they were merely a purchaser of goods and a broker for TMHI is unpersuasive. The evidence demonstrates that the activities of the parties in this case evolved primarily in Texas. TMHI is a Texas corporation. Some of the appellants had a course of dealings with TMHI for approximately nine years. They entered into contracts with TMHI for the sale of chemicals. The Trustee aptly points out that the contracts were generally performed in Texas and that the chemicals were delivered and stored in Texas. After paying for the chemicals in the United States, the appellants sold the chemicals in their individual Central and South American countries.

The Court finds persuasive the fact that the contracts contained a choice of law provision which makes it clear that Texas law governed these numerous transactions. It is

noteworthy that the appellants' entities are directly or indirectly majority owned by Texas residents. Further, each of the appellants has at least one officer and director residing in Houston. These facts, in the aggregate, demonstrate that the appellants purposely availed themselves of the privilege of conducting activities within the state of Texas. Accordingly, the Court concludes and holds that the Trustee has made a prima facie showing of jurisdiction.

Once it is decided that appellants purposely established minimum contacts with the forum state, those contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction comports with "fair play and substantial justice." *Burger King*, at 477. With respect to this issue, the Court finds the Trustee's contentions compellingly persuasive.

The state of Texas has an interest in a case when it is shown that the appellants contracted with a Texas corporation. It is clear that by virtue of the appellants' conduct and activities, they have enjoyed the benefits, protection, and privileges of a Texas forum. The petition in bankruptcy of one of the parties is pending in the Southern District of Texas. The Trustee aptly points out that: (a) most of the creditors are United States residents residing or operating in this District; (b) the contracts states that Texas law will govern any dispute between the parties; (c) the chemicals were delivered in large part at the Port of Houston; and (d) the debtor's records, pertaining to its transactions with appellants are located in Texas.

Therefore, the Court concludes that it is reasonable and fair to require the appellants to conduct their defense in Texas. For these reasons, the Court affirms the bankruptcy court's ruling, that personal jurisdiction exists over the appellant.

Next, the Court turns to the appellants' contention that service of process was improper. The appellants argue that the Trustee must comply with the Inter-American Convention on Letters Rogatory. It should be noted that the convention does not preempt other methods of service. *Kreimerman v. Casa Veerkamp, S. A. de C.V.*, 22 F.3d 634, 644 (5th Cir.), *cert. denied*, (1994). See also FRCP 4(c)(1). Consequently, the question is whether service by the Trustee was reasonably calculated to give notice under FRCP 4(f) or TRCP 103 and 106(2) of the Texas Rules of Civil Procedure.

The evidence reveals that the Trustee attempted service by regular mail, courier, and facsimile transmission. These methods do not comport with FRCP 4(f) or TRCP 103 and 106(2) summons in that service by mail may be completed only by the Clerk of Court. Actual notice of a lawsuit does not obviate the clear mandate of Rule 4(e).

Accordingly, the Court holds that the bankruptcy court erred in finding that service was proper and reverses the bankruptcy court's judgment.

Lastly, the Court will examine the appellants' contention that the bankruptcy court erred in denying their motion to dismiss based on *forum non conveniens*. The bankruptcy court's order denying a motion to dismiss on *forum non conveniens* grounds may be reversed only where there has been a clear abuse of discretion. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). There first must be a showing that an alternative forum exists. *Id.* at 254.

As the Court discussed above, most of the issues made the basis of this suit relate to Houston, Texas. The bankruptcy case is pending in the Southern District and most of the creditors are located in the United States. All of the debtor's records and witnesses are located in the Southern

District of Texas. The appellants have officers and directors residing in this District. The appellants have failed to make a showing that an alternative forum exists. Therefore, the Court affirms the bankruptcy court's ruling on this point. For these reasons,

It is ORDERED that the bankruptcy court's holding, denying the appellants' motion to dismiss based on lack of personal jurisdiction and *forum non conveniens* grounds is sustained.

It is further ORDERED that the bankruptcy court's order denying the appellants' motion to dismiss based on improper service of process is REVERSED.

It is so ORDERED.

Signed this 1st day of May, 1995.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. 95-1316

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SOLVENTES Y QUIMICA DE NICARAGUA, S.A. SOLQUIMISA; TRANSMERQUIM DE MEXICO, S.A. DE C.V.; TRANSQUIMICA, S.A. DE C.V.; TRANSMERIDIAN GUATEMALA, S.A.; TRANSMERIDIAN EL SALVADOR, S.A. DE .C.V.; TRANSMERQUIM DE COSTA RICA, S.A.; and QUIMICA FLAMINGO, S.A.; AND TRANSQUIMICA S.A. DEC. V.
Petitioners,

v.

JOHN W. WEAVER, LIQUIDATING TRUSTEE
Respondent

On Petition for a Writ of
Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

The issues presented by the Petition, as restated, are as follows:

1. Whether each Defendant's extensive and persistent contacts with the State of Texas and the United States, including entering into contracts performable in Texas and governed by Texas law; taking delivery of the contracts' subject matter in Texas; employing agents and officers in Texas; and engaging in larger scale, systematic business relationships with an affiliated corporation whose sole place of business is in Texas, compels the conclusion that the United States Bankruptcy Court of the Southern District of Texas can exercise *in personam* jurisdiction over each of the Defendants?

2. Whether the United States Bankruptcy Court of the Southern District of Texas' assertion of personal jurisdiction, under the facts presented, satisfies the United States Constitutional requirements of due process and traditional notions of fair play and substantial justice?

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STATEMENT OF THE CASE

The Respondent concurs with the Petitioners' statements as to the Proceedings Below.

THE FACTS

The Latin American Affiliates

Trans Marketing Houston, Inc. ("TMHI") was formed in 1983. All of its stock is owned by Frans G. J. Speets ("Speets") and Richard C. Kellogg, Jr. ("Kellogg") of Houston, Texas. (Tr. 655) TMHI filed for bankruptcy relief under Chapter 11 in April of 1993. The Official Creditors' Committee proposed a liquidating Chapter 11 Plan which was confirmed by the Bankruptcy Court in early 1994. John W. Weaver (hereinafter "Trustee") was appointed Trustee under that Plan. He brought this case seeking turnover of funds or collection of accounts from each of the seven Defendants.

TMHI sold chemicals in eight Central and South American countries (i.e., Mexico, Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua, Columbia and Venezuela) through what were consistently referred to as the "affiliates" or "our Central and South American distribution companies." (See direct examination of Frans G. J. Speets given in Bankruptcy Court April 22, 1993 in the main case, hereinafter referred to as the "Speets Testimony," at Tr. 502-501). Seven of those eight affiliates are Defendants in this adversary proceeding and are referred to in the Complaint and in this Brief as the "Latin American Affiliates" or "Affiliates." Speets and/or Kellogg were officers and directors of each of the Latin American Affiliates. (See Speets Testimony at Tr. 501). These companies have consistently been held out as distribution vehicles of TMHI.

(See affidavit of John W. Weaver, hereinafter referred to as the "Weaver Affidavit," Exhibit A Tr. 465).

The Latin American Affiliates were all set up and funded in the same fashion. TMHI purchased chemicals on credit; usually took delivery of the chemicals in Texas; and then sold and delivered those chemicals to the Affiliates on extended 180 day open payment terms. (Speets Testimony at Tr. 505). TMHI would refinance that credit by bank borrowings since the payment terms being given the Affiliates by TMHI were significantly more favorable than those being given TMHI by its suppliers. (Speets Testimony, Id.). As a result of these transactions, approximately $6.285 million was owed to TMHI by the Latin American Affiliates at the time of bankruptcy out of approximately $12.3 million in total receivables. (Speets Testimony at Tr. 506). In other words, debt owed by the these defendant Affiliates constituted approximately one-half of the total accounts receivable of TMHI at the time the bankruptcy was filed.

TMHI lost its bank financing when the bankruptcy case was filed. This meant that it could not continue to give extended terms to its Latin American Affiliates and still pay its suppliers. (Speets Testimony at Tr. 505). Nonetheless, it was estimated that about half of the $6.3 million which was owed by the Affiliates could be collected within 60 days. (Speets Testimony at Tr. 503). This was in part due to the fact that Speets and Kellogg were officers of the various Latin American Affiliates (Speets Testimony at Tr. 501). Indeed, Kellogg and Carlos Rodriguez ("Rodriguez") met in Houston with Banque Paribas in June 1993 on behalf of the five companies located in Central America and Mexico to negotiate terms of repayment. (See Affidavit of Marian E. Livingston attached as Exhibit 1 to Plaintiff's Response to Defendants' Plea to the Jurisdiction, hereinafter "Livingston

Affidavit," at TR. 208). Kellogg's subsequent correspondence acknowledged Rodriguez's authority as representative of what continued to be called the "Mexican and Central American Distribution Affiliates." (See Exhibit A to Livingston Affidavit at Tr. 205). Rodriguez has, incidentally, consistently been shown as a manager or officer of one or more of the Central American companies in information distributed to the public. (See Weaver Affidavit, Exhibits A and B at Tr. 460 and 449).

Speets or Kellogg hold majority ownership and control of each of the Latin American Affiliates by reason of the fact that one or the other owns at least 60% of the stock in each company or that the two of them together own 95% of the stock of TMH (Trans Marketing Houston) N.V. which in turn owns the controlling stock in the Affiliates. (See Livingston Affidavit at Tr. 207-206 and Weaver Affidavit, Exhibits C-1, C-2 and C-3 at Tr. 419).

Specific Transactions with Individual Defendants

Each of the individual Affiliates has engaged in a persistent and systematic course of conduct of entering into contracts by telex or mail with TMHI in Houston for the purchase of chemicals on credit and the arranging for their shipment; taking delivery of such chemicals in Houston or at various other points in the United States; contracting to pay the amounts owed in the United States for the benefit of a bank in Houston; and, in at least two cases, holding bank accounts in the United States.

Attached to the Weaver Affidavit as Exhibit N at Tr. 280 is a summary statement of the open contracts with the Latin American Affiliates as of July 21, 1993. See Resp. Br.

App. A. Several bear invoice dates of April 15, 1993, i.e., the day before the voluntary bankruptcy filing.

Connections with Banque Paribas Houston Agency

In December, 1992, TMHI entered into a renegotiation of its banking relationship with Banque Paribas Houston Agency. As a result of these negotiations, TMHI executed various loan agreements and other documents. Significantly, Speets, Kellogg and TMH (Trans Marketing Houston) N.V. guaranteed TMHI's debt to Banque Paribas. Moreover, each pledged its stock in the Latin American Affiliates as security for guaranties of TMHI's debt to Banque Paribas. (See Weaver Affidavit, Exhibits C-1, C-2 and C-3 at Tr. 419). Thus, the controlling stock ownership of all of the Latin American Affiliates is not only directly or indirectly owned by two U. S. residents--Speets and Kellogg--but that stock is actually held by a bank in Houston as security for loans to TMHI.

The Panachem Relationship

The Latin American Affiliates were unable to use TMHI for the acquisition of chemicals following its bankruptcy. To solve this problem, those Affiliates entered into an exclusive agency relationship with a United States entity based in Houston called Pan American Chemical Marketing, Ltd. ("Panachem").

The Latin American Affiliates have "created and financed" an entity to continue to represent them in the United States and that agent has its principal office in Houston, Texas.

Relationship of TMHI and the Latin American Affiliates

As acknowledged by Speets, either he or Kellogg hold management positions with each of the Latin American Affiliates. Indeed, the Latin American Affiliates have been held out to the industry for a number of years as mere instrumentalities or distribution arms. (See Weaver Affidavit, Exhibits A and B at Tr. 460 and 449). Substantial purchasing decisions were influenced or directed from Houston. (See Weaver Affidavit at Tr. 462). The money sought to be turned over in this lawsuit represents the capitalization of the Latin American Affiliates which was supplied by TMHI as a result of credit purchases from persons who are still owed money in TMHI's bankruptcy. The Speets Testimony makes clear that the Latin American Affiliates could not have existed without the extension of credit from TMHI. Indeed, they continue to exist and operate by reason of not having repaid their just debts to TMHI. This intimate relationship was acknowledged by Speets and Kellogg when they pledged their stock in the Latin American Affiliates to secure TMHI's credit facility from Banque Paribas. In short, the Latin American Affiliates are separate or foreign corporations in name only--they are actually no more than the instrumentalities or alter egos of TMHI and Speets and Kellogg.

REASONS FOR DENYING WRIT

I. Bankruptcy Rule 7004(d) is Not in Controversy in this Case as Jurisdiction can be maintained under other State and Federal Statutes.

The central issue presented by this Petition for Writ of Certiorari is personal jurisdiction over the Defendants.

The Petitioners have characterized this dispute as one that involves the application of Bankruptcy Rule 7004(d) in order to create a novel controversy worthy of this Court's attention. In fact, this case neither directly implicates Bankruptcy Rule 7004(d) nor is review of Bankruptcy Rule 7004(d) necessary to resolve the issues presented by this case. The Petition should be denied.

Bankruptcy Rule 7004 governs the service of process in adversary proceedings. It is the Bankruptcy Court's equivalent of Rule 4 Fed. R. Civ. Proc. Bankruptcy Rule 7004(d) allows service of process anywhere in the United States. Since the Petitioners are defendants residing in foreign jurisdictions outside of the United States, Bankruptcy Rule 7004(d) is clearly inapplicable to this case. Bankruptcy Rule 7004(e)(C) governs service in a foreign country. It provides that service can be made using the methods described in Fed. R. Civ. P. 4(c)(2)(C)(i) or (e). Fed. R. Civ. P. 4(e) allows service "under the circumstances and in the manner prescribed in the statute or rule" of the state in which the district court sits. Thus, this case involves the analysis and application of the Texas Long Arm Statute Tex. Civ. Pract. Rem. Code 17.042 rather than Bankruptcy Rule 7004(d). The case law has clearly defined the reach of the Texas Long Arm Statute and the facts of the case at hand fall squarely within these limits. Review by the United States Supreme Court will neither resolve a conflict among courts of appeal nor clarify the current case law.

The Petitioners incorrectly assert that there is confusion or conflict among the circuits on the subject of long-arm jurisdiction in a case such as presented here. Courts have reached different results in individual cases in deciding whether or not *in personam* jurisdiction has been established in a particular case. These differing results do

not, however, flow from different or competing legal principals. *In personam* jurisdiction is essentially a fact driven inquiry based upon well established constitutional and procedural principals of law. The Petitioners, in this case, are simply seeking a review of the fact findings made by the lower courts that those legal principals support *in personam* jurisdiction in this particular case.

II. Jurisdiction can be maintained under Texas Long Arm Statute.

In cases where a court is attempting to exercise extra territorial jurisdiction over a defendant under a state long arm statute, the inquiry is whether the defendant has had minimum contacts with the forum. International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement, 326 U.S. 310, 315, 66 S.Ct 154, 158, 90 L.Ed. 95 (1945). Applying this analysis to the facts in the instant case, it becomes clear that the requirements for *in personam* jurisdiction imposed under either federal law or under the Texas Long Arm Statute have been met. Since jurisdiction can be imposed under both state and federal law, review of Bankruptcy Rule 7004(d) is not a genuine controversy in this case and the Petition should be denied.

A federal court when attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process must consider the defendant's contacts with the United States as a whole rather than just with the forum in its minimum contacts analysis. Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255 (5th Circuit 1994); Fitzsimmons v. Barton, 589 F.2d 330 (7th Circuit 1979). The Bankruptcy Code is such a federal statute and nationwide service on a foreign defendant is countenanced by Bankruptcy Rule 7004.

In re Chase & Sanborn Corp. v. Granfinanciera, S.A., 835 F.2d 1341, 1344 (11th Cir. 1988), reversed on other grounds as rev'd on other grounds sub.nom., Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

Courts have also applied the United States aggregate contacts test in their jurisdictional inquiry when applying a state long arm statute pursuant to Bankruptcy Rule 7004(e). In re Ace Pecan Co., Inc., 143 B.R. 696 (Bankr. N.D. Ill. 1992); Highway Equipment Co. v. Alexander Howden, Ltd., 120 B.R. 910 (Bankr. S.D. Ohio 1990). The Trial Court properly considered all of the Defendants' contacts with the United States in its finding of jurisdiction. Regardless of whether the court considered the Defendants' contact with just Texas or with the United States as a whole, however, the Defendants' contact with the forum state was sufficient to satisfy either test and justify the imposition of jurisdiction under the Texas Long Arm Statute. In fact, service in accordance with the Texas Long Arm Statute has been made subsequent to this Appeal.

Contact with the Forum

As noted by the Court in International Shoe, supra, the first touchstone for jurisdiction is the defendant's voluntary contact with the forum. In this case, each of the Affiliates have systematically entered into contracts with TMHI in Houston, Texas. The course of dealing with some of the Affiliates goes back almost nine years. TMHI and the Defendants were engaged in a common enterprise. Speets and Kellogg controlled and directed all of the companies, in one form or another, from Houston. (Weaver Affidavit, p. 5) (T.R. 465) Chemicals were sold by TMHI to each of its

Affiliates who, in turn, sold the chemicals to customers in the individual Central and South American countries.

The contracts between TMHI and the Affiliates were consistently performable by the delivery of United States products in the United States (usually Texas) for the benefit of the Affiliate who was obligated to pay in the United States for the goods so delivered. The contracts consistently provided that the law of the State of Texas would govern. All of the Defendants are directly or indirectly majority owned by Texas residents. Six of the seven Defendants voluntarily consented to the pledge of the majority of their shares to a Texas bank in order to secure an obligation of a Texas debtor, i.e., TMHI. Each of the Defendants has at least one officer and director, i.e. Speets or Kellogg, who resides in Houston. Two of the Defendants maintain bank accounts in the United States and one of those accounts is in Houston. The Defendants have continued to do business in the United States since TMHI's bankruptcy and have, in fact, set up and employed an exclusive agent to act on their behalf from its office in Houston, Texas.

The Affiliates are Not Mere Passive Purchasers

The contracts between TMHI and the individual Latin American Affiliates are a sufficient basis for jurisdiction. The Texas Long Arm Statute provides that: "a non resident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or part in [Texas]." Tex. Civ. Prac. Rem. Code Ann. § 17.042 (Vernon 1987). The statute has passed federal constitutional scrutiny and has been held to reach as far as federal requirements of due process under the U.S. constitution will allow. Product Promotions, Inc. v. Cousteau, 495 F.2d 483, 494 (5th Cir. 1974).

The Petitioners have portrayed the Affiliates in their dealings with TMHI as mere passive purchasers and have asserted that this status exempts them from jurisdiction. Neither of these assertions are correct.

The Petitioners imply that the fact that the Affiliates were the buyers rather than the sellers somehow alleviates the need for further jurisdictional inquiry. They cite Rosenberg Bros. & Co. v. Curtis Brown Co., Inc., 260 U.S. 516 (1923) as "the seminal case concerning the jurisdictional exclusion for purchases." Petition for Writ of Certiorari, P. 7. The purchaser distinction in that holding, however, is limited to the assertion of *general* jurisdiction over a defendant. The United States Supreme Court in Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868, 1874 (1984) specifically refrained from indorsing the Rosenberg holding to matters involving *specific* jurisdiction. "In accordance with Rosenberg, we hold that mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[emphasis added]. Courts have commented in reference to the holding in Rosenberg that the "United States Supreme Court...has advanced beyond the presence theory underlying that case" and that Rosenberg is "obsolete" in specific jurisdiction analysis. Henry R. Jahn and Son, Inc. v. Superior Court of San Mateo County, 323 P.2d 437, 439 (Cal. 1958). The transactions which supply the contacts with the forum necessary to sustain jurisdiction are the very subject of this suit. Rosenberg's purchaser distinction is inapplicable to the facts of this case.

Moreover, the Affiliates' contact with Texas goes far beyond a mere purchaser and the Petitioners' "mail order

analogy" is outside the facts of this case. The District Court found, "the appellants' contention that they were merely a purchaser of goods ... unpersuasive. The evidence demonstrates that the activities of the parties in this case evolved primarily in Texas." See Pet. Br. App. C at 11a. The Affiliates recruited Texas residents as officers of the corporation. See Pet. Br. App. C at 11a-12a. Courts have long held that whether or not a Defendant recruits residents from the forum as employees is a relevant factor to jurisdictional analysis. International Shoe, 326 U.S. at 314. Speets and Kellogg made executive decisions in their roles as officers and directors of Affiliates from within the forum. The stock of the Affiliates was pledged to a Texas bank. The Affiliates were involved in a common business enterprise with a Texas corporation, TMHI. The place of performance of the contracts which are the subject of this suit is Texas.

Courts have consistently looked to the place of contractual performance to determine whether the making of a contract with a Texas resident is sufficiently purposeful to satisfy minimum contacts. Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061, 1068 (5th Cir. 1992); Product Promotions, 495 F.2d at 497; Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852-853 (5th Cir. 1966); See McGee v. International Insurance Co., 355 U.S. 220, 223 (1957) (The United States Supreme Court found that an insurance contract formed through the mails had enough connection with the forum to sustain personal jurisdiction).

In Product Promotions, the court was faced with a defendant foreign corporation whose only contact with Texas was the delivery of reports and film to Houston on activity (that was the subject of the contract) which took place out of the state. The contract was formed through the mails

between a Texas resident and a French corporation. The Defendant had no business, advertising, bank accounts, or representatives in the state. Product Promotions, 495 F.2d at 495. It did not solicit business in Texas and, in fact, the plaintiff initiated the contract which was the subject of the suit in France. Product Promotions, 495 F.2d at 495. It never had any physical presence in the state of Texas. Product Promotions, 495 F.2d at 495. The court nonetheless found personal jurisdiction over the corporation based on the fact that a part of contractual performance took place in Texas:

> [The defendant] entered into a contract that required some performance in Texas; that it did not contemplate breaching its own obligations does not make it unreasonable to foresee that those obligations might be tested in Texas... In short, [the defendant] voluntarily entered into a transaction with one it knew to be a Texas resident, a transaction which had a substantial connection with Texas and which [the defendant] had reason to know could have consequences in Texas.

Product Promotions, 495 F.2d at 497.

TMHI was a Texas corporation. See Pet. Br. App. C at 11a-12a. Each Affiliate entered into numerous contracts in which the place of contractual performance was in Texas. See Pet. Br. App. C at 11a-12a. The documents that evidenced these transactions were in Texas. TMHI stored its chemicals in Texas. See Pet. Br. App. C at 11a. The chemicals were delivered in Texas. See Pet. Br. App. C at 11a. The contracts provided that Texas law governed the contracts. Defendants' choice of Texas law to govern its

contracts with the Debtor is in itself not conclusive, but is certainly relevant in determining whether Defendants have purposefully invoked the benefits and protection of Texas law. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). These facts go well beyond those in Product Promotions. It can hardly be said that the Affiliates could not foresee being brought into a Texas court for debts not paid which arose from these contracts.

The Petitioners argue that the terms of the sales contracts between TMHI and the Defendants, such as place of delivery, choice of law, risk of loss, transfer of title, and place of payment, should not be considered in the Courts determination of "purposeful availment of the laws of Texas" because of what they allege is a lack of evidence to demonstrate whether or not these provisions were bargained for by the Defendants. They argue that since these provisions benefited TMHI, it was unlikely that any Defendant participated in the decision making process for the inclusion of these provisions in the contracts and inclusion of these provisions merely represents unilateral activity on the part of TMHI. This argument misconstrues "purposeful availment of the law" to require that a particular provision of a contract be requested or even desired by the Defendant to serve as basis to establish minimum contacts.

A purposeful availment inquiry focuses on contact of the Defendant with the forum so as to determine if it is fair for this defendant to be hailed into the courts of that jurisdiction to answer a lawsuit. Product Promotions, 495 F.2d at 494. There is no dispute that the Defendants chose to enter into numerous contracts with TMHI that had a Texas choice of law provision, that required the Defendants to make payment in Texas, and that required the Defendants to accept

delivery in Texas. These activities are not unilateral because each provision required action on the part of the Defendant in either agreeing to the terms of the contract (i.e. choice of law provision) or complying with their requirements (i.e. accepting delivery in the jurisdiction). The buyers acquiesced in all of the terms and conditions of these contracts on many occasions over a number of years.

There is no authority cited for the proposition that each individual provision of a contract must be desired by or beneficial to a defendant in order for that defendant to have purposely availed itself of the benefits of the forum. The uncontroverted evidence is that each of these buyers wanted the products which TMHI had to sell; those products were located in the United States; and TMHI was willing to sell them on more favorable credit terms than other sellers (including those from whom TMHI had to buy the products). Under those circumstances, the District Court was certainly justified in holding that all of the terms bearing upon the issue of the permissible exercise of jurisdiction were accepted by the Defendants over a long period of time in what was perceived to be a mutually beneficial relationship.

The Petitioners also argue that, since their contacts with Texas were made at the direction of Speets and Kellogg, they cannot be considered action of the Defendants. As made clear by the Speets Testimony, Speets and Kellogg were officers and directors of the Defendants. The fact that they held similar roles with TMHI does not in any way vitiate their decisions on behalf of the Defendants to voluntarily engage in extremely beneficial purchases of goods in Texas. To the contrary, the relationship of Speets and Kellogg to these Defendants establishes yet another jurisdictional contact with the forum state. Individual officers and directors of the Defendants were residents of Texas.

Their actions on behalf of the Defendants would be imputed to those Defendants for whom they acted, rather than to TMHI.

The Petitioners also argue that the corporate veil must be pierced before any action of Speets and Kellogg can be imputed to the Defendants in establishing the minimum contacts. They recite the rule of law announced in Lakota Girl Scouts C., Inc. v. Havey Fundrais. Man., Inc., 519 F.2d 634 (8th Cir. 1975) which held that a stockholder's ownership interest in a corporation with a presence in the forum cannot be considered contact by that stockholder with the forum without a piercing of the corporate form. As noted above, Speets and Kellogg are more than just stockholders. They serve as officers and, as officers, they are employees of the Defendants. Courts have long held that whether or not a Defendant employs residents of the forum as employees is a relevant factor in jurisdictional analysis. International Shoe, 326 U.S. at 314. Moreover, Speets and Kellogg made executive decisions within the forum in their roles as officers and directors of Defendants. Their actions as employees of the Defendant corporations are properly considered action by those corporations. Lakota is inapplicable to these facts.

The Petitioners assert that this case is factually similar to Hydrokinetics, Inc. v. Alaska Mechanical, Inc., 700 F.2d 1026 (5th Cir. 1983). In Hydrokinetics, the court found that a Texas plaintiff failed to establish an Alaskan Defendant's purposeful availment of the law of the forum when the defendant agreed to purchase goods from a Texas manufacturer, payment for these goods was to be made in Texas, and, before any written agreement was executed, extensive communication occurred between the parties originating in Texas and Alaska. The plaintiff in Hydrokinetics argued that these activities were within the

facts of Product Promotions and established the requisite contact of the Defendant with the forum for personal jurisdiction.

The Hydrokinetics Court found that these actions did not constitute minimum contacts, distinguishing Product Promotions on the basis (1) that the Hydrokinetics contract provided that the law of the Defendant's state would govern the contract (2) that the case involved a single contract rather than a repeated series of transactions and (3) that in Product Promotions "an integral, essential portion of . . . performance, delivery of the [subject of the contract], took place in [the forum]" while that was not true in the Hydrokinetics sale. Hydrokinetics, 700 F.2d at 1030.

Every factor that the Hydrokinetics court found important in holding a lack of jurisdiction points towards establishing jurisdiction in this case. The sales contracts between TMHI and the Defendants provided that Texas law would govern. The Defendants had dozens of contacts with Texas rather than a single transaction. Both payment for and delivery of goods took place in Texas. Moreover, many other contacts are present in this case that were not found in Hydrokinetics. The Defendants employed Texas residents. The Defendants are controlled by Texas residents. The Defendants were involved in a long term interdependent relationship with a Texas corporation and Defendants continue to solicit business in Texas through Panachem. The Hydrokinetics case fails to support the Defendants' position since it is factually distinguishable from the instant case in every significant regard.

The Petitioners also cite Stuart v. Spademan, 772 F.2d 1185 (5th Cir. 1985) for the argument that the Defendants' contact with Texas in this case does not amount to purposeful

availment of the law. The facts in Stuart do not go as far as those present in this case. Stuart, like Hydrokinetics, involved a single transaction with the forum and did not involve a repeated series of contracts over many years as between TMHI and the Affiliates. The contract in Stuart did not provide for delivery of goods in the forum. The shipment of articles referred to in Stuart involved the mailing of sample goods to the manufacturer for modification and testing. This action was viewed by the court as part of the negotiation of the contract rather than the ultimate delivery of goods which would constitute a satisfaction of the sellers contractual performance. Stuart, 772 F.2d at 1193. Stuart also did not have a choice of law provision in the contract which specifically stated that Texas law would govern. The defendant in Stuart did not recruit employees from Texas and did not continue to solicit business in the jurisdiction. None of the Latin American Affiliates in this case were passive purchasers with no "continuing course of conduct between the parties." L & P Converters, Inc. v. H.M.S. Direct Mail Service, Inc., 634 F.Supp 365 (D.Mass. 1986). The contacts in Stuart are factually dissimilar from this case and the decision is inapplicable.

Any rule of law which prevents Texas residents from using Texas courts to enforce contracts with foreign defendants where the contractual place of performance is in Texas would chill international commerce. Texas corporations would be unwilling to extend credit to foreign purchasers for fear of having to litigate in a foreign jurisdiction to collect debts. The Petitioners' argument seriously affects the constitutionality recognized interest of the forum in protecting its citizens from Defendants who breech their contracts. See Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, 480 U.S. 102, 115 (1987); McGee, 355 U.S. at 223-224.

The longstanding business relationship of the parties is another basis of jurisdiction. In Burger King, the court found that the relationship created by a franchise agreement subjected the franchisee to the forum state of the franchisor because the defendant:

> reach[ed] out beyond one state and creat[ed] continuing relationships and obligations with citizens of another state [and is] subject to regulation and sanctions in the other state for the consequence of [his] activities.

Burger King, 471 U.S. at 472.

The relationship here between the parties is similar to the continuing relationship in Burger King. The Affiliates depended on TMHI to sell them U.S. chemicals and to extend favorable credit terms which would not be available with an arms length supplier. TMHI depended on the Affiliates to resell goods to various South American countries and pay TMHI the purchase price. More than half of TMHI's entire receivables are owed by the Affiliates. The Affiliates had continuing obligations to TMHI and Texas in the form of long term credit extensions. Each Affiliate has entered into a large number of transactions with TMHI as part of an ongoing relationship. Indeed, the Speets Testimony makes clear that the Latin American Affiliates could not have existed without the extension of credit from TMHI. The intimate relationship between the Affiliates and TMHI was acknowledged by Speets and Kellogg when the Affiliates' stock was pledged to Banque Paribas in order to secure TMHI's credit facility.

It has already been noted that the contracts contained a Texas choice of law provision. Indeed, that choice of law

provision brought with it the substantial protection afforded to purchasers by Texas law. This factor, as well as the much greater physical connection between the Affiliates and TMHI, was significant to the court in Burger King in sustaining *in personam* jurisdiction. In short, the relationship between TMHI and the Affiliates gave the Affiliates substantial connections with the State of Texas. Those connections brought with them the obvious foreseeability of exposure to litigation in Texas courts and serve to provide minimum contacts necessary for personal jurisdiction.

III. The exercise of personal jurisdiction on the Defendants by the United States Bankruptcy Court for the Southern District of Texas clearly satisfied Constitutional due process requirements and traditional notions of fair play and substantial justice.

The Petitioners assert that even if minimum contacts are established, the exercise of jurisdiction on the Affiliates will offend traditional notions of fair play and substantial justice as defined in the Asahi fundamental fairness test. Asahi 480 U.S. at 112. There is no basis to contend that the burden on these Defendants of litigation in the United States is so disproportionate that the Court should not entertain jurisdiction under the Asahi fairness test. In the first place, there is no showing at this stage that there is any serious factual dispute on the merits of this litigation other than the wish of the Petitioners not to be sued in the United States. Moreover, it is well recognized that modern means of communication and transportation have lessened the burden of defending a lawsuit in a distant forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

A representative of five of the Affiliates, Mr. Rodriguez, has travelled to Houston on at least one occasion to negotiate with Banque Paribas over the subject matter of this lawsuit. (See Livingston Affiliate at p.2, Tr. 207) The Affiliates each have officers and directors - Speets and Kellogg - who reside in Houston. Defending a lawsuit in this jurisdiction can be no more burdensome than performing other corporate responsibilities in the operation of the business of each defendant which has had a long and continuous relationship to Texas. These officers are also the majority stockholders of the corporations and have the singular authority to make any legal decision in the defense of this case.

The Defendants are dependant on chemical suppliers located in the United States. They have systematically and continuously engaged in hundreds of transaction in the United States and have property flowing in and out of the country. They continue to solicit business in this country. As acknowledged by the Petitioners in their brief in the Court of Appeals, the Trustee has already seized 1500 Tons of caustic soda from one of the Defendants in this jurisdiction during the pendency of this appeal.

It cannot be said that it is unduly burdensome for the Affiliates to defend a suit here. If anything, this is the most convenient jurisdiction for all of the parties to defend a suit. The only reason the Affiliates are resisting jurisdiction is in hope that the hardship of litigation in seven separate foreign jurisdictions will end the collection efforts of the Trustee.

The Forum's Interest in Adjudicating the Dispute

No forum has a greater interest in adjudicating this dispute than the United States District Court for the Southern

District of Texas. The bankruptcy of one of the parties is pending there. Virtually all of the creditors are United States residents and a large number reside or operate in the Southern District of Texas. The law of Texas, by agreement, will govern any dispute. The goods giving rise to the debt were made and delivered in the United States of America and a large number of those deliveries were at the Port of Houston. The majority of the stock of each Affiliate is pledged to a bank located in the Southern District of Texas. The Debtor's records pertaining to its transactions with Affiliates giving rise to this case are located in this forum. Efficiency and judicial economy make this the most appropriate forum for the adjudication of these claims. Appellee's alternative would be to prosecute this action in seven different and distant locales which might be unwilling or unable to apply the law that the parties have chosen, i.e., that of the State of Texas. The most convenient and effective place to resolve these disputes is the District in which the seller contracted with the Defendants for the delivery of the goods and in which the seller is in bankruptcy proceedings--the Southern District of Texas. Jurisdiction can be maintained under the Texas Long Arm Statute.

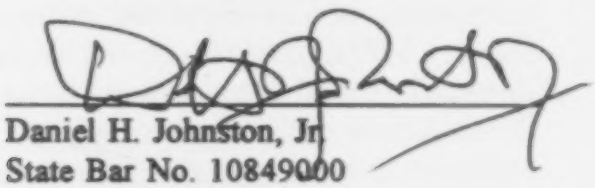
CONCLUSION

Each of the Defendants has extensive and systematic contacts with the State of Texas and the United States of America. Those contacts are sufficient to establish *in personam* jurisdiction over each Defendant under the Texas Long Arm Statute. As such, review of Bankruptcy Rule 7004(d) by the United States Supreme Court is not necessary and the Petition for Writ of Certiorari should be denied.

WHEREFORE PREMISES CONSIDERED John W. Weaver, Liquidating Trustee prays that this Court deny the

Petition for Writ of Certiorari and that he have such other and further relief to which he may show himself to be justly entitled.

Respectfully submitted,



Daniel H. Johnston, Jr.
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FOR JOHN W. WEAVER,
LIQUIDATING TRUSTEE

OF COUNSEL:

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APPENDIX A

AFFIDAVIT OF JOHN W. WEAVER

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared JOHN W. WEAVER, who after being duly sworn on his oath, says and deposes that the following is true and correct to his best information and belief:

> "My name is John W. Weaver and I reside in Scottsdale, Arizona. I have been appointed Trustee of the Liquidating Trust created by the confirmed Chapter 11 Plan in the bankruptcy of Trans Marketing Houston, Inc. ("TMHI").
>
> I entered into performance of my duties on approximately March 8, 1994. At that time, I took over all of the assets, books and records of TMHI which previously were being regularly maintained up to the time of my appointment by employees of the Company. I took over the Debtor's offices initially and I thereafter removed those books and records to a less expensive location here in Houston. Those books and records have been continuously maintained under my

custody and control since the time of my appointment and continue to be so maintained.

One of the largest assets of the Trust is approximately $5 million in accounts receivable owed by seven companies incorporated in various Central and South American countries and who are the Defendants in this adversary proceeding. Those Defendants are generally and collectively referred to as the "Latin American Affiliates." I would note that this is not a phrase which I invented. For instance, the accounts receivable ledger of the Company has one account for trade receivables owed by third parties and a separate account for trade receivables owed by the affiliated companies in Central and South America. Moreover, there are numerous documents in the Company's books and records where the Latin American Affiliates are referred to as affiliates or as distribution arms of TMHI.

For instance, attached hereto as Exhibit A is a portion of one such brochure. At no place does it make clear that these entities are not owned by TMHI, although I have discovered since my appointment that the companies are in fact owned directly or indirectly in the majority by Messrs. Speets and/or Kellogg and with a minority stake, in some cases, being owned by management in the individual countries. This affiliation or distributor relationship among the Defendants has continued since TMHI's bankruptcy.

Attached hereto as Exhibit B is a true copy of a brochure describing Pan American Chemical Marketing, Ltd. ("Panachem"). As noted, the second page of the brochure describes the Latin American Affiliates as a "group of distributors throughout Latin America."

Further evidence of the relationship between Speets and Kellogg and these companies appears in various public documents, as well as the Company's records. For instance, TMHI entered into a restructure of its financing with Banque Paribas in December of 1992. As part of that financing, pledge agreements were entered into by TMH (Trans Marketing Houston) N.V., Speets and Kellogg. Under these pledge agreements, the majority of the stock in all of the Latin American Affiliates was pledged to Banque Paribas Houston Agency. Copies of the relevant portions of those pledge agreements are attached hereto as Exhibits C-1, C-2 and C-3.

I have read portions of sworn testimony by Frans Speets in these bankruptcy proceedings in which he acknowledges that either he or Mr. Kellogg hold officer and director positions with each of the Latin American companies. In addition, the Company files contain at least one note by TMH (Trans Marketing Houston) N.V. signed by Mr. Kellogg as President. A copy is attached hereto as Exhibit D. Both Mr. Speets and Mr. Kellogg reside in Houston.

The Latin American Affiliates have been doing business with TMHI for a number of years. At the time of my appointment, there were a number of contracts with each of the companies which were "open" to the extent that the goods had been delivered, but the Affiliates had not paid. TMHI's general terms and conditions contain two provisos. First, the general law of the State of Texas governs. Second, the International Chamber of Commerce so called "Incoterms" 1990 Edition, govern shipments. I am attaching hereto as Exhibit E relevant portions of the Incoterms 1990 with respect to the terms employed by TMHI and contracts with its Latin American Affiliates.

At the time of the TMHI bankruptcy and at the time of my appointment, there were approximately 190 "open" contracts with the Latin American Affiliates who are Defendants in this case. The documentation on these purchases by the Latin American Affiliates fill three file drawers and are comprised of several thousand pages of contracts, invoices, bills of lading, and so forth. These are only the contracts which I refer to as "open" in the sense that the buyer has not paid for the product which has been delivered. There have been a much larger volume of identical contracts over the years where the Affiliates have paid as agreed.

In spite of the large number of transactions, the way those agreements were

made and the transactions carried out are remarkably similar. The purchase would initially be contracted for with a trader in TMHI's office in Houston over the telephone and a contract sheet written up. That agreement would be confirmed by a telex setting out the basic business terms. Each telex contained a proviso that it would incorporate the TMHI standard terms and conditions and would be a "done deal" unless objection was made within a limited period of time. Each telex provided that credit and payment would be on terms established by TMHI. The particular chemicals were thereafter delivered to ships with the freight prepaid for the benefit of the buyer. The shipping terms were always CIF (i.e., cost, insurance and freight included in the price and delivery to the buyer at the point of shipment) except in the case of the Mexican Affiliate. Delivery in that situation was usually fob Brownsville, Texas (delivery to the buyer at Brownsville). The bill of lading was then sent to the buyer so that the goods could be claimed on arrival.

By way of illustration, I am attaching a sample of documents with each Affiliate and these documents are representative of the way that all transactions with the affiliates were handled:

TRANS MERIDIAN EL SALVADOR
S.A. DE C.V.

F-1	Contract Sheet
F-2	Telex Confirmation
F-3	Invoice with Payment Terms and General Terms and Conditions
F-4	Proof of Delivery
F-5	Bill of Lading and Transmittal

TRANSMERIDIAN GUATEMALA, S.A

G-1	Contract Sheet
G-2	Telex Confirmation
G-3	Invoice with Payment Terms and General Terms and Conditions
G-4	Proof of Delivery
G-5	Bill of Lading and Transmittal

TRANSMERQUIM DE COSTA RICA, S.A.

H-1	Contract Sheet
H-2	Telex Confirmation
H-3	Invoice with Payment Terms and General Terms and Conditions
H-4	Proof of Delivery
H-5	Bill of Lading and Transmittal

TRANSMERQUIM DE MEXICO, S.A. DE C.V.

J-1	Contract Sheet

J-2 Telex Confirmation
J-3 Invoice with Payment Terms and General Terms and Conditions
J-4 Proof of Delivery

TRANSQUIMICA, S.A. DE C.V (Honduras)

K-1 Contract Sheet
K-2 Telex Confirmation
K-3 Invoice with Payment Terms and General Terms and Conditions
K-4 Proof of Delivery
K-5 Bill of Lading and Transmittal

QUIMICA FLAMINGO, S.A.

L-1 Acknowledgement of Oral Agreement from Quimica
L-2 Telex Confirmation
L-3 Invoice with Payment Terms and General Terms and Conditions
L-4 Acknowledgement of Delivery to Ship
L-5 Bill of Lading and Transmittal

SOLVENTES Y QUIMICA DE NICARAGUA, S.A. SOLQUIMISA

M-1 Contract Sheet
M-2 Telex Confirmation
M-3 Invoice with Payment Terms and General Terms and Conditions

M-4 Proof of Delivery to Ship
M-5 Bill of Lading and Transmittal

These sample documents reflect the ordinary course of dealing between these parties over many years. There is no indication that any of the Latin American Affiliates objected to the course of dealing, the general terms or conditions or the required methods of payment. Attached hereto as Exhibit N is an itemized listing of the invoices with these Defendants shown to be outstanding according to the books and records of the Company.

The Company's files indicate that a high degree of the management of purchases by the Latin American Affiliates was directed from Houston. For instance, none of these sales required an entire ship and many were quite small. It appears that the sales to the Latin American Affiliates were often put together from Houston so that a ship under TMHI's hire could drop off partial cargoes at several or all of the Latin American Affiliates as the ship sailed from North to South. A reasonable conclusion to be drawn from these shipping patterns is that the Americans who owned the majority of the Latin American Affiliates' stock were directing when and what those Affiliates should buy.

Likewise, the Latin American Affiliates permitted TMHI to provide other services in the United States. For instance, TMHI paid

routine consul fees for three of the Latin American Affiliates out of its funds even after TMHI was in bankruptcy. The companies involved repaid a portion of that money from personal money market accounts maintained in the United States by foreigners. See Exhibits O-1 through O-4 attached hereto. On the whole, therefore, TMHI and its Latin American Affiliates appear to have operated as an integrated unit until after the bankruptcy filing."

Further the Affiant sayeth not.

/s/_____
JOHN W. WEAVER

SUBSCRIBED AND SWORN TO before me by JOHN W. WEAVER this 3rd day of October, 1994, to certify which witness my hand and seal of office.

/s/_____
Notary Public, State of Texas

*The exhibits to this Affidavit are not attached and can be found in the Record of the Court of Appeals.